TENG CHUA HUAT

v.

GOVERNMENT OF MALAYSIA

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL APPEAL NO: 11-7-1998]
14 OCTOBER 1998

REVENUE LAW: *Real property gains tax - Assessment - Civil proceedings instituted by government to recover tax - Whether amount assessed may be disputed - Whether assessment of tax can amount to a triable issue to resist summary judgment - How may an assessment be appealed against - Real Property Gains Tax Act 1976, ss. 18, 21 & 23*

This was an appeal against the decision of the Magistrate Court granting summary judgment to the respondent for a certain sum being real property gains taxes owed by the appellant to the respondent. The facts leading to this appeal were that the appellant was one of the administrators of his deceased father's estate, letters of administration having been extracted on 9 January 1972. The estate property was transmitted to the administrators on 21 December 1978 and on 23 January 1980, the property was vested in the name of the beneficiaries, one of whom was the appellant. On 20 June 1981, the beneficiaries sold the property and the appellant was assessed a certain sum being real property gains tax for the disposal of his share in the property. In arriving at this assessment, the respondent took into account the year 1970 as the date of acquisition of the property.

The appellant's appeal was based on two grounds, namely, whether the notice of assessment ought to have taken into account the year 1980 and not 1970 as the date of acquisition of the property and whether as a result of this, a triable issue had been raised.

Held:

[1] Assessment of tax by the Revenue can never be construed as a triable issue. Section 23(1) of the Real Property Gains Tax Act 1976 ('the Act') enacts that tax due and payable may be recovered by the government by civil proceedings as a debt due to the government whilst s. 23(3) of the Act provides that the court may not entertain any plea which disputes the amount of tax sought to be recovered. Further, s. 21(1) of the Act provides that upon being served with the notice of assessment, the tax shall be due

and payable whether or not the person assessed appeals against the assessment. Thus, the question whether the assessment itself was proper or otherwise was not for this court to determine.

[2] The present appeal came up to this court by way of an appeal from the decision of the Magistrate Court. There was no referral at all to the Special Commissioners of Income Tax. Pursuant to s. 18 of the Act, a person aggrieved by an assessment should appeal to the Special Commissioners of Income Tax before coming to this court by way of a case stated. Without a doubt the appellant can be classified as a person aggrieved by the assessment and thus he should have adopted the course provided by s. 18 of the Act.

[Appeal dismissed.]

Case(s) referred to:

Comptroller of Income Tax v. A Co Ltd [1966] 2 MLJ 282 ***(refd)***

Comptroller of Income Tax v. Harrisons & Crosfield (Malay) Ltd [1954] 20 MLJ 83 ***(refd)***

Director-General of Inland Revenue v. Ooi Guan Hoe [1986] 2 MLJ 385 ***(refd)***

Fadzil Mohamed Noor v. Universiti Teknologi Malaysia [1981] 2 MLJ 196 ***(refd)***

Government of Malaysia v. Abdul Rahman [1975] 1 MLJ 276 ***(foll)***

Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713 ***(refd)***

Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1970] 1 MLJ 145 ***(refd)***

Sun Man Tobacco Co Ltd v. Government of Malaysia [1973] 2 MLJ 163 ***(refd)***

Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali Ibrahim [1985] 2 MLJ 225 ***(refd)***

United Malayan Banking Corporation Bhd v. Development and Commercial Bank (Ltd) Bhd [1983] 1 MLJ 165 ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 99, 100, 101, 102, sch 5

National Land Code 1965, s. 327

Real Property Gains Tax Act 1976, ss. 12, 18, 21(1), (4), 23(1), (3), para 28, sch 2

For the appellant - Lim Hui Ting; M/s Tan & Tan

For the respondent - Zaleha Adam

Reported by S Dharmendran

JUDGMENT

Abdul Malik Ishak J:

This case came up by way of a civil appeal from the decision of the learned Magistrate, Magistrate's Court, Johor Bahru, on a question of law. The learned Magistrate allowed an application for summary judgment by the Government

of Malaysia ("respondent") against Teng Chua Huat @ Teng Kwee Chua ("appellant") for the sum of RM5,180.12 being real property gains taxes owed by the appellant to the respondent for the 1982 year of assessment and the order has since been extracted as reflected at pp. 4 and 5 of the appeal record. Being aggrieved the appellant now appeals to the High Court.

The brief facts may be stated as follows. The appellant's father by the name of Lee Teng Seng @ Teng Ting Seng held, at one time, 1/2 undivided share in a property known as H.S (D) 8912, Lot 7709, Bandar Johor Bahru and he died on 10 December 1967. On 9 January 1972, the letters of administration of the estate of the appellant's late father were extracted. On 21 December 1978, the appellant's late father's 1/2 undivided share in that property was transmitted to the appellant and the appellant's mother as administrator and administratrix respectively of the estate of the deceased. On 23 January 1980, the appellant's late father's property was transferred to the appellant, the appellant's mother by the name of Low Leng Eng, the appellant's brother by the name of Teng Boon Chua, and the appellant's sister by the name of Teng Ah Moi and these personalities held the property as beneficiaries in equal shares. On 20 June 1981, the appellant and the three other beneficiaries sold the property to Kah Yew Realty Sdn Bhd for the sum of RM118,188. On 5 October 1991, the appellant was assessed the sum of RM4,709.20 being real property gains tax for the disposal of his share in the property as reflected in the statement of claim at p. 9 of the appeal record paras. 3 and 4 thereof. In arriving at this assessment, the respondent took into account the date of the acquisition to be 1970 and the date of the acquisition price to be the market value in 1970 which was RM24,000 – this was the market price on 1 January 1970.

The notice of appeal that was dated 24 January 1998 as seen at pp. 1 and 2 of the appeal record carried with it three questions of law for this court to determine and they were as follows:

(1) Whether the notice of assessment that took into account the year 1970 as the date of acquisition of the property and not the year 1980 was bad and wrong in law as it failed to comply with the principles enunciated in the case of *Director-General of Inland Revenue v. Ooi Guan Hoe* [1986] 2 MLJ 385?

(2) Whether the certificate issued by the respondent and not by the Director General runs foul of section 48 (1) of the Real Property Gains Tax Act 1976?

(3) Whether the respondent's cover slip form (borang daftar kulit) shows the date of posting of the notice of assessment to the appellant?

Before me, the appellant abandoned issues (2) and (3) and argued on issue (1) and also raised a fresh issue, which was worded thus:

> Whether the appellant in raising and relying on the case of *Director-General of Inland Revenue v. Ooi Guan Hoe [supra]* had in fact raised a triable issue?

In this judgment, I do not propose to examine issues (2) and (3) as they have been abandoned by the appellant. I need only to consider the remaining two issues together as they are related to one another.

The First Issue And The Fresh Issue

This calls for an examination of the case of *Director-General of Inland Revenue v. Ooi Guan Hoe [supra]*, a case decided by the High Court of Penang by his Lordship Mohamed Dzaiddin J (now FCJ). That case was an appeal by the Revenue by way of a case stated against the decision of the Special Commissioners of Income Tax under para. 34, Sch. 5 of the Income Tax Act 1967 which was made on 28 April 1983 on one ground and that was that it was wrong in law. I need to quote in *extenso* the judgment of Mohamed Dzaiddin J (now FCJ) in that case in order to gain benefit and derive assistance from it. But before I do that, a recital of the facts should be carried out briefly. The respondent Ooi Guan Hoe wore two hats; he was the administrator of his father's estate as well as its sole beneficiary. After the death of his father in 1941, the subject properties were transferred to the respondent Ooi Guan Hoe as an administrator. The issues that arose which the court had to decide were: when was the date of the acquisition and whether para. 28, Sch. 2 of the Real Property Gains Tax Act 1976 was applicable. These issues appeared when the ownership of the properties were transferred to the respondent Ooi Guan Hoe as an administrator as well as a beneficiary. The properties were registered in the name of the respondent Ooi Guan Hoe as the new owner on 4 September 1975 and on 18 December 1978 (entering the 4th year after the acquisition on 4 September 1975) the respondent Ooi Guan Hoe sold the properties to a purchaser for RM160,000 while the properties were valued at RM128,000 as at 4 September 1975. His Lordship Mohamed Dzaiddin J (now FCJ) held that the acquisition value for the purpose of s. 12 of the Real Property Gains Tax Act 1976 was on the date of the acquisition by the respondent Ooi Guan Hoe as the beneficiary, which was the date of the vesting order, namely, 4 September 1975. His Lordship further held that the respondent Ooi Guan Hoe was not a bare trustee and consequently para. 28, Sch. 2 did not apply. This was what his Lordship said at p. 386 of the report:

> The Special Commissioners held that the requisition dated 16 May 1980 issued by the appellant for the real property gains tax amounting to $11,989.40 for the year of assessment 1978 under section 12 of the Real Property Gains Tax

Act 1976 ["the Act"] for properties known as holdings 1579 and 1580 of section 4, Bandar Butterworth, District of Province Wellesley North ("the subject properties") was wrong. Their finding is that pursuant to para 28 of Schedule 2 of the Act the subject properties were deemed to be acquired by the respondent prior to 1 January 1970. They are also of the opinion the acquisition value is the market value as at that date, and therefore the rate of tax to be applied in the circumstances of the case is only 5 percent.

At p. 387 of the report, his Lordship Mohamed Dzaiddin J (now FCJ) continued:

I think the difficulty in determining the acquisition date in this case is due to the respondent acting in two legal capacities. He is the administrator of his father's estate as well as the only beneficiary of the estate. The Revenue argued that he acts in two separate capacities. On the death of deceased the properties were transferred to him as administrator. As there was no gain or no loss under para 3 (a) of Schedule 2, there was no gains tax chargeable. However, it is when the ownership of the properties were transferred by him as administrator to himself as the beneficiary that para 2 Schedule 2 of the Act applies. The paragraph states as follows:

> Subject to this Schedule, every method, scheme or arrangement by which the ownership of an asset is transferred from one person to another (including compulsory acquisition under any law) shall constitute an acquisition of the asset by the transferee and a disposal of the asset by the transferor.

I agree with the Revenue that when the assets of a deceased person devolved to him as administrator the disposal price is equal to the acquisition price (para 3 (a) Schedule 2). So no gains tax is payable. However, on 4 September 1975 when the properties were registered in his name as the new owner, then under para 2 Schedule 2 the said transfer amounts to an acquisition by him in his capacity as beneficiary and a disposal by him as an administrator. Encik Hamid also referred to paras 15(1)(b) and 3(a)(i) of the same schedule and section 215 of the National Land Code. Para 15(1)(b) states that except where this Schedule provides otherwise, a disposal of an asset shall be deemed to take place, in the case where there is no agreement, on the date of the completion of the disposal of the asset and the date of completion of a disposal means the date on which the ownership of the disposed is transferred by the disposer. As there is no definition of the word 'transfer' in the Act and the subject matter being land, he has rightly relied on section 215 of the National Land Code because under our system of land laws, the ownership is vested upon registration.

In my opinion, the argument of Encik Abdul Hamid is cogent because the acquisition and the disposal is to and from the same person wearing two legal hats. In the circumstances of this case, para 3 Schedule 2 only applies upon devolution of the father's properties on him as administrator. Therefore, it

follows that the acquisition value for the purpose of section 12 of the Act is on the date of acquisition by the respondent as the beneficiary, which is the date of the vesting order *ie*, 4 September 1975.

Finally, on the issue of the applicability of para. 28, Sch. 2 of the Real Property Gains Tax Act 1976, his Lordship said (at p. 388 of the report):

In the Act, the word trustee is not defined. However, under section 3(1) of the Trustee Act 1949, trustee includes a personal representative. Although the respondent under the circumstances is a trustee, but having regard to his beneficial interest and the duties he had to perform or which he had performed to extract the Grant of Letters of Administration it is my finding that he was not a bare trustee. As such, I hold that para 28 Schedule 2 does not apply in this case.

Now, applying the case of *Director-General of Inland Revenue v. Ooi Guan Hoe [supra]* it was strenuously argued that the date of acquisition of the present appeal should be 23 January 1980 when the property was transferred to the appellant and the three other beneficiaries and, consequently, the notice of assessment took into account the wrong year of 1970 when the date of acquisition should have been 1980. In my judgment, the first issue for the determination of this court related to the question of whether the correct date of the acquisition should be 1970 or 1980 and this question was in effect a question questioning whether the tax has been correctly assessed. It was an ingenious method of going through the back door when entry would be refused at the first instance by way of the front door. Seen in this context, the first issue was doomed to fail right from the very beginning. Assessment of tax by the Revenue can never be construed as a triable issue. What are triable issues would vary from case to case and would be dependent on whether the appellant here could show a good defence to the claim by the respondent. The journals are replete with authorities on what would constitute triable issues. Suffice for this exercise that two of those authorities be referred to. For a start the decision of Mohamed Dzaiddin J (now FCJ) in *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali bin Ibrahim* [1985] 2 MLJ 225, 226, is worth referring to. There his Lordship observed:

The issue here is whether or not there is a triable defence. This simply means that it is for the defendant to show on merits, he has a good defence to the claim, or that a difficult point of law is involved, or the dispute is as to the fact which is to be tried or any other circumstances showing reasonable grounds of a *bona fide* defence (See: *The Supreme Court Practice 1985* Vol. 1 - 'Defence Showing Cause' at page 137).

Then there is the case of *Fadzil bin Mohamed Noor v. Universiti Teknologi Malaysia* [1981] 2 MLJ 196, 198, where Raja Azlan Shah CJ Malaya (as His Majesty then was) made this pertinent observation:

> We now consider the application for summary judgment. It was rightly raised by counsel for the University that the case turns on the interpretation of the provisions of Act 30 of 1971 and the Constitution of the University, and therefore the court ought to be very cautious in treating it under Order 14. We are disposed to agree with that argument for this reason; not that cases depending on the interpretation of a statute or statutes deserve any different treatment from that of any other case under Order 14. An Order 14 order in the view we have always taken of it is a very stringent procedure because it shuts the door of the court to the defendant. The jurisdiction ought only to be exercised in proper cases. If the University and University Colleges Acts and related legislation come into an Order 14 case, no greater attention in principle is to be given by the court to that class of action than to any other class of action. The only point is that as everybody knows the pertinent legislation is long and complicated. But it is not sufficient under an Order 14 case to flourish the title of the University and University Colleges Act, etc, in the face of the court and say that is enough to give leave to defend. If a point taken under the Acts is quite obviously an unarguable point, and the court is satisfied that it is really unarguable, the court has precisely the same duty under Order 14 as it has in any other case. The court has the duty to apply the rule: (see *Harry Tong Lee Hwa v. Yong Kah Chin* [1981] 2 MLJ 1).

I am constrained to hold that the fresh issue raised by counsel for the appellant is not a triable issue as it involves an assessment of tax by the Revenue and nothing else. Section 23(1) of the Real Property Gains Tax Act 1976 enacts that tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government. Section 23(3) of the Real Property Gains Tax Act 1976 enacts as follows:

> 23(3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 21(4).

and it is thus necessary to produce s. 21(4) of the Real Property Gains Tax Act 1976, in verbatim, as follows:

> 21(4) Subject to subsection (3), where any tax due and payable on the service of a notice in accordance with subsection (1) or (2) has not been paid within thirty days after the service of that notice (or within such longer period as may be allowed by the Director General), so much of the tax as is unpaid upon the expiration of those days or that period, as the case may be, shall without any further notice being served on him be increased by a sum equal to ten percent of the tax so unpaid, and that sum shall be recoverable as if it were tax due and payable under this Act:
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> Provided that -

(a) if the tax payable is reduced on appeal or otherwise, the sum paid or payable by way of increase shall be reduced proportionately; and

(b) the Director General may in his discretion for any good cause shown remit the whole or any part of any increase in the tax payable under this subsection.

The fate of the appellant stands on thin ice. Section 21(1) of the Real Property Gains Tax Act 1976 deals a severe blow to the appellant and it is worded thus:

21(1) Subject to this section, the tax payable under an assessment shall, on the service of the notice of assessment on the person assessed, be due and payable at the place specified in that notice whether or not that person appeals against the assessment.

No doubt the case of *Director-General of Inland Revenue v. Ooi Guan Hoe [supra]* laid down the principle to be applied in making an assessment but the question of whether the assessment itself was proper or otherwise was not for this court to determine. Moreover, the case of *Director-General of Inland Revenue v. Ooi Guan Hoe [supra]* went right up to the High Court as an appeal by way of a case stated against the decision of the Special Commissioners of Income Tax. Here, the scenario was different. The present appeal came up to this court by way of an appeal from the decision of the Magistrate's Court. There was no referral at all to the Special Commissioners of Income Tax. The appellant here as an aggrieved taxpayer should appeal to the Special Commissioners of Income Tax before coming to this court by way of a case stated. This is clearly provided for under s. 18 of the Real Property Gains Tax Act 1976 and for ease of reference it is now reproduced:

18(1) A person aggrieved by an assessment made on him may appeal to the Special Commissioners against the assessment in the same manner as an appeal against an assessment of income tax made under the Income Tax Act, 1967, and the provisions of sections 99, 100, 101 and 102 of that Act, as far as they are applicable and with the necessary modifications, shall apply to an appeal against an assessment made under this Act as if –

(a) every reference in those sections to income tax or to tax were a reference to real property gains tax; and

(b) every reference in those sections to income were a reference to chargeable gains.

(2) The provisions of Schedule 5 to the Income Tax Act, 1967, shall apply with necessary modifications to the hearing of appeals to the Special Commissioners and to the hearing of further appeals.

(3) Where a person appeals under this Act, he shall not be entitled in the appeal to re-open any issue which has been finally and conclusively settled by virtue of section 20(1) unless it is an issue already re-opened by the Director General.

The words "person aggrieved" have not been defined in the Real Property Gains Tax Act 1976 and they must surely vary according to the context and the factual matrix of a particular case. By way of an analogy, references should be made to the decisions of fellow judges to the meaning behind the words "person aggrieved" as reflected in a number of statutes. For a start, reference should be made to the case of *Comptroller of Income Tax v. Harrisons & Crosfield (Malay) Ltd* [1954] 20 MLJ 83 where at p. 85, Mathew CJ remarked:

> *Prima facie*, a company which has been assessed to tax at a figure greater than the law allows and has applied to the Comptroller to review and to revise the assessment and the Comptroller refuses to do so is, one would think, in common parlance, 'a person aggrieved'. In *Ex parte Sidebotham, Re Sidebotham* 14 Ch 458, James L.J. said at page 465:
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> > But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.
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> We think that the Company in the present case can be said to come within that definition, and in our opinion clearly has a right of appeal to the Board of Review under section 75(1) of the Ordinance.

Next, in *Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1970] 1 MLJ 145, 147, Ali FJ considered the meaning of an aggrieved person in the context of s. 327 of the National Land Code 1965 in these words:

> In terms of this section an applicant has to be an aggrieved person, *ie*, a person who is aggrieved by the existence of the caveat because it adversely affects him in the sense that he is prevented from dealing with his right or interest in the land under caveat.

Finally, in *United Malayan Banking Corporation Bhd v. Development and Commercial Bank (Ltd) Bhd* [1983] 1 MLJ 165 FC, in the context of the National Land Code 1965, Wan Suleiman FJ had this to say of an aggrieved person or body (see p. 167 to p. 168 of the report):

> 3rd defendant applied *inter alia* for the caveat entered by plaintiff to be set aside. The learned trial judge applied the test of whether the former would suffer loss if the caveat was not removed and held on the facts that he would

indeed suffer loss, and was therefore a person aggrieved by its existence within the meaning of section 327(1) of the Code.

Our attention was drawn to the fact that whilst the trial judge had earlier found that one Dato Wong Kee Tat had agreed to purchase the land, he later modified this finding, and stated instead that Dato Wong had offered to buy the land at $61 million. Dr. Goh's contention is that a mere offer is not good enough to confer on the chargee the status of an aggrieved party. Section 322(2) of the National Land Code, as the learned judge noted *inter alia* provides:

(2) The effect of any private caveat expressed to bind the land itself shall, subject to subsections (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of –

(a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto.

Alternatively, says Dr. Goh, the respondent must come with a certificate of sale before he can be regarded as an aggrieved party. There was, he said, no evidence of any action by respondent to foreclose, and consequently no certificate of sale was ever issued (under section 259(3) of the Code).

Mr. Thayalan's reply to this last point is this. Any application by the respondents for an order for sale (under section 256) would require advertisement of the sale, and mention therein that the property is covered by a caveat would result in no sale at all.

The learned judge, having satisfied himself that there had indeed been an offer by one Dato Wong Kee Tat to buy the land for $61 million added that assuming the proprietor of the land and the respondents agreed that it was a fair price and were willing to close the deal, the caveat would prevent registration of the certificate of sale on the register document of title (see section 322(2) of the Code). That he held was sufficient to make respondents/ plaintiffs an aggrieved body.

We agree that the two reasons mentioned above are indeed sufficient grounds for holding that respondents are an aggrieved body.

Without a doubt the appellant can be classified as a person aggrieved by the assessment of the Revenue and he should therefore seek his remedy by proceeding first to the Special Commissioners of Income Tax and ultimately to this court. The course undertaken by the appellant was a perilous one; a course which serves no useful purpose at all.

Section 99 of the Income Tax Act 1967 enacts that a person aggrieved by the assessment made on him by the Revenue may appeal to the Special Commissioners against the assessment by giving the Director-General a notice of 30 days after the service of the notice of assessment. It must be remembered

that the appellant as an aggrieved person seeking to appeal may at any time make an application to the Director-General for an extension of period within which the notice of appeal against the assessment may be given (see s. 100 of the Income Tax Act 1967). The Director-General, upon receipt of the notice of appeal, may review the assessment. That review would see the Director-General and the aggrieved party come to an agreement either as to the amount of tax or additional tax or that there is no tax at all (see section 101 of the Income Tax Act 1967). It is interesting to note that s. 102 of the Income Tax Act 1967 provides that the Director-General may send the appeal to the Special Commissioners at any time if he is of the opinion that there is no reasonable prospect in coming to an agreement with the aggrieved party. The duty will then fall on the Special Commissioners to proceed to hear the appeal in accordance to the regulating provisions in Sch. 5 of the Income Tax Act 1967. Lord President Azmi in *Sun Man Tobacco Co Ltd v. Government of Malaysia* [1973] 2 MLJ 163, 164 observed as follows:

> In my opinion the learned judge was right in this instant case where he said that if the taxpayer wished to dispute that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4) or (5) he has to do so by way of appeal to the Special Commissioners. That opinion would appear consistent with the scheme of the Income Tax legislation. It is only in relation to any disputes on questions of law at the hearing before the Special Commissioners that the matter can be brought to the High Court by way of a case stated.

And Gill FJ in the same case applied the decision of Choor Singh J in *Comptroller of Income Tax v. A Co Ltd* [1966] 2 MLJ 282, 284 vigorously as seen at p. 165 of the report where his lordship had this to say:

> In *Comptroller of Income Tax v. A Co Ltd* [1966] 2 MLJ 282, 284, Choor Singh J summed up the law in such lucid terms that I need no more than echo the following words of his lordship with which I respectfully agree:
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> > In my opinion, once the Comptroller of Income Tax has made an assessment and issued a notice of assessment to a taxpayer calling upon him to pay the tax mentioned in the notice, the taxpayer is bound by law to pay such tax within one month even though he may be dissatisfied with the assessment. Whether the assessment is right or wrong, the tax must be paid notwithstanding any objection or appeal. The scheme of the Income Tax Ordinance is that if any person disputes the assessment, he may apply to the comptroller to review and revise the assessment made upon him. If the comptroller refuses to amend the assessment, the aggrieved taxpayer may appeal to the Board of Review appointed under section 78 of the Ordinance and the board may, after hearing the appeal, confirm, reduce, increase or annul the assessment or make such order thereon as to it may seem fit. The taxpayer or the

> comptroller may then appeal to the High Court from the decision of the board upon any question of law or mixed law and fact. A taxpayer has no right to by-pass the Board of Review and take his complaint direct to court. And when the Comptroller of Income Tax sues a taxpayer to recover tax due under a notice of assessment, the taxpayer cannot be heard to say that the assessment on which tax has been levied was not made in accordance with the provisions of the Ordinance. Such a complaint must in the first instance be laid before the Board of Review. The provisions of Order XIV of the Rules of the Supreme Court must be read together with the provisions of the Income Tax Ordinance. If this is not done every unwilling taxpayer will refuse to pay tax and when sued in court, will challenge the merits of the assessment, thus causing considerable delay in the collection of the tax. The proper course for every aggrieved taxpayer is to pay his tax and present his arguments against the assessment made upon him before the Board of Review.
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> In place of a Board of Review we now have the Special Commissioners of Income Tax. It is open to a taxpayer to go before them and prove that he is not liable to assessment. The doors of justice are not shut to him merely because the claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a non-judicial manner. It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts.

Obviously, the Revenue in *Director-General of Inland Revenue v. Ooi Guan Hoe [supra]* proceeded correctly by way of a case stated against the decision of the Special Commissioners. The same is not true in the present appeal. The appellant, in desperation, relied on the case of the then Supreme Court in *Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713 to bolster up his case. Alas, that case too proceeded by way of a case stated to the Special Commissioners of Income Tax. On the duty of the Supreme Court when hearing appeals from the Special Commissioners, Edgar Joseph Jr SCJ (now senior FCJ) had this to say in that case (see p. 732 of the report):

> First of all, it would be pertinent to say that in considering this appeal we have kept in the forefront of our minds the much-quoted principles enunciated by Lord Radcliffe in *Edwards v. Bairstow and Harrison* [1956] AC 14; [1955] 3 All ER 48; [1955] 3 WLR 410, regarding the duty of the court when hearing appeals from commissioners in tax cases. It will be recalled that in that case what Lord Radcliffe said (at pp. 35-36) was this:
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> > I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the

> facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

Perhaps the present appeal can best be summed up in the words of Arulanandom J in *Government of Malaysia v. Abdul Rahman* [1975] 1 MLJ 276:

> When proceedings are commenced under Order 14 the normal rules for triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act. Normally when defence raised triable issues it is a rule of law that unconditional leave to defend should be given but under section 106(3) of the Income Tax Act it clearly states that in any proceedings commenced by the Government under section 106(1) of the Act for the recovery of tax by civil proceedings as a debt due to the Government the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103 (4) or (5). In this case the Director-General had exercised his powers under section 91(1) of the Act and made additional assessments and added penalties which were provided for by the Act. Since the amount was not paid within thirty days further penalties were added and since that was not paid civil proceedings were brought to recover the tax as a debt due to the Government. Under section 103(1) regarding payment of tax, the section reads:

103.(1) Subject to this section, tax payable under an assessment for a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment, as the case may be.

It is therefore quite clear that the Act does not contemplate any finality of assessment as it is clearly required in the Act that the moment the Notice of Assessment is served on the taxpayer the tax becomes payable whether the taxpayer appeals against the amount or not. Therefore I do not see any merit in defendant's argument that the assessment was not final.

The upshot of it all was this: The appellant's appeal must be dismissed with costs and the decision of the learned Magistrate as reflected in the order at pp. 4 and 5 of the appeal record was confirmed forthwith.